IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23781-8-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
TERRY J. KERN,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

BROWN, J.—Terry J. Kern mainly contends she was denied effective assistance of counsel in her Walla Walla County convictions for first degree criminal mistreatment and failure to report. Further, she contends the criminal mistreatment statute is unconstitutional. Additionally, she raises numerous procedural errors and trial defects, including an alleged improper judicial comment. We reject her contentions, and affirm.

FACTS

Ms. Kern's mother, Ruth Lintner, was an overweight, legally blind, wheelchair bound, double amputee suffering from diabetes and numerous related complications who required State assistance since the mid-1990s. Ms. Kern and her brother, Robert[1]

Linter, provided the needed care for their mother in Robert's home under renewing written service contracts executed by a Department of Social and Health Services (DSHS) Aging and Long Term Care (ALTC) agency. For about five months ending in May 2003, Ms. Lintner lived at a nursing home during repairs at Robert's home. When arriving at the nursing home Ms. Lintner exhibited poor hygiene and head lice. Ms. Lintner returned to Robert's home over the objection of Ms. Lintner's doctor, Jon Gardner, but with very specific ALTC service requirements.

On July 16, 2003, Robert telephoned Violet Bland, an ALTC registered nurse, reporting his mother had a small sore on her back and had not been taking her medications. When Ms. Bland entered Robert's home that afternoon, she detected a strong odor coming from Ms. Lintner's bedroom. Nurse Bland discovered Ms. Lintner had urinated on herself and the bed sheets. While changing the bed linens, Ms. Bland noticed an oozing four inch square white area on Ms. Lintner's thigh, commonly known as a bedsore, leading to Ms. Lintner's immediate emergency hospitalization.

At the hospital, Ms. Lintner was presented with feces on her thigh and peri area. Maggots were collected in and around the bedsore. Medical records showed the bedsore had tunneled completely through Ms. Lintner's thigh. Dr. Gardner testified the maggots were about six days old and would eat solely dead tissue. Dr. Gardner described Ms. Lintner's wound as a decubitus ulcer, known as a bed or pressure sore.

After immediate surgery to remove the dead tissue, the wound culture showed

[1] We use Mr. Lintner's first name to avoid confusion.

positive for proteus penneri, a bacterium found in feces that can cause a deadly sepsis infection in the bloodstream. Because Ms. Lintner's urine was negative for the proteus bacteria, Dr. Gardner opined the bacteria must have entered the bloodstream through the infection in Ms. Lintner's open wound causing Ms. Lintner's death. According to the death certificate signed by Dr. Gardner, Ms. Lintner died on July 22, 2003 from proteus penneri sepsis that Dr. Gardner related to Ms. Lintner's right thigh decubitus ulceration.

In 2003, Ms. Kern and Robert were charged with second degree manslaughter of their mother. They retained William McCool to represent them. Prior to trial, apparently without formal arraignment or objection, the State amended the information to add the alternative charge of first degree criminal mistreatment. In the February 2004 trial, Mr. McCool presented two experts, Dr. Fredrick Field and Jean Sherman, R.N., and multiple lay witnesses to dispute the State's causation and poor-care evidence. Dr. Field disputed Dr. Gardner's diagnosis, opining the bedsore was caused by a diabetic related occlusion and Nurse Sherman opined the wound was not a pressure sore due to location. The jury acquitted Robert and Ms. Kern on the manslaughter charge but disagreed 10 to 2 for guilt on the criminal mistreatment charge, causing a mistrial.

In May 2004, Mr. McCool withdrew because of a plea negotiation conflict. Gail Siemers was then appointed to represent Ms. Kern. Five days before the November 2004 criminal mistreatment retrial, the State filed a second amended information adding a failure to report charge under RCW 74.34.053(1). Ms. Siemers did not object or seek a continuance. No formal re-arraignment

or amendment permission is shown. Ms. Siemers did not subpoena or contact Dr. Field or Nurse Sherman. Ms. Siemers subpoenaed five lay witnesses from the prior trial and Robert, but she called none to testify. The State called Robert. Ms. Kern was the sole defense witness. The court answered one jury question during deliberations by underlining instructions with counsel's agreement in Ms. Kern's presence. Ms. Kern was convicted as charged.

By new counsel, Ms. Kern moved for a new trial based on ineffective assistance of counsel. Ms. Kern mainly argued Ms. Siemers failed to investigate, contact, interview, subpoena, or call relevant witnesses. Several lay witnesses and the two expert witnesses from the first trial provided supportive declarations. Additionally, Mr. McCool declared, based on his criminal defense training, experience, and standard-of-practice knowledge, he could see no legitimate basis for Ms. Siemers' alleged failures. Mr. McCool saw no strategic or tactical reason for Ms. Siemers behavior. Mr. McCool opined, unless Ms. Siemers could offer some plausible explanation for her failures, she had provided ineffective assistance to Ms. Kern. Mr. McCool concluded, otherwise, the outcome would have been different.

The State, supported by Ms. Siemers' declaration, contradicted each of Ms. Kern's ineffective assistance arguments. Ms. Siemers gave reasons for not calling the witnesses and provided her defense strategy and supporting tactics. Ms. Siemers declared Ms. Kern had denied any mistreatment and insisted Robert was the actual caregiver. Ms. Kern insisted she was not contractually required to provide any "basic necessities of life" not already being

provided by Robert. Ms. Siemers declared either she or her paralegal contacted the lay witnesses named by Ms. Kern. Ms. Siemers partly reasoned the lay witnesses had not seen Ms. Lintner in the last critical weeks. Further, Ms. Siemers declared she reviewed the first trial transcript to educate herself about the witnesses and their potential testimony.

During trial, Ms. Siemers chose not to call the lay witnesses because they would have provided the jury with a negative view of Ms. Lintner, a sympathetic victim, and not have been able to describe Ms. Lintner's last days. Ms. Siemers believed negative testimony would have alienated the jury and confused the care issue, while being irrelevant to both charges. Ms. Siemers decided not to call medical witnesses because none had seen Ms. Lintner in the critical days before July 16. Since Ms. Kern was acquitted of manslaughter, she did not need expert cause-of-death testimony.

The trial court denied her new trial motion and stayed Ms. Kern's standard range sentence pending this appeal.

ANALYSIS

A. New Trial Motion and Ineffective Assistance of Counsel

The issue is whether the trial court abused its discretion in denying Ms. Kern's new trial motion. Ms. Kern contends she received ineffective assistance of counsel.

Granting or denying a new trial based upon a claim of ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion. *State v. West*, 139

Wn.2d 37, 42, 983 P.2d 617 (1999) (citing *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989)). Discretion is abused when the court relies on untenable grounds or reasons. *State v. Teems*, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997).

We analyze ineffective assistance claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must show trial counsel's conduct was (1) deficient, falling below a minimum objective standard of reasonable attorney conduct, and (2) prejudicial. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). Prejudice requires the defendant to show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). We strongly presume effective representation and do not consider strategic or tactical decisions ineffective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

Effective representation requires counsel to "conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses." *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (citing *State v. Jury*, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978)). The "[f]ailure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

Here, the trial court was confronted with conflicting arguments supported by conflicting declarations from Mr. McCool and Ms. Siemers. Implicitly, the trial court accepted Ms. Siemers' declaration on the

material points.

First, Ms. Siemers declared she opted for a denial and blame-shifting defense strategy. Second, she decided tactically not to call the lay witnesses who lacked knowledge of Ms. Lintner's last days. Third, Ms. Siemers reasoned tactically the lay witnesses might have alienated the jury by providing a negative view of a sympathetic, suffering victim. Fourth, Ms. Siemers declared she talked to the potential witnesses; at least one agreed. Fifth, Ms. Siemers reviewed the first trial transcript to evaluate witness potential for her chosen strategy. Sixth, given the manslaughter acquittal, the first trial experts' death causation views were unnecessary and would have emphasized the gory details of Ms. Lintner's wounds, making her more sympathetic to the jury.

The trial court gave tenable reasons and grounds. We cannot say the trial court abused its discretion in denying Ms. Kern's new trial motion since Ms. Siemers strategic and tactical decisions do not support an ineffective assistance claim. Ms. Kern argues Mr. McCool's defense strategy was superior, but it merely resulted in a jury hung 10 to 2 for guilt on the criminal mistreatment charge, not an acquittal. Ms. Kern fails to explain how the former strategy would fit against the new failure to report charge. Thus, we cannot say the former defense would necessarily have bolstered the new primary defense strategy. *See Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (discussing need to select tactic to bolster, not detract from primary defense strategy).

RCW 9A.42.020 provides that "a person employed to provide . . . the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010,

causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life." Calling the expert witnesses could, as suggested by Ms. Siemers, fix attention on the horrific wound and distract the jury from focusing on who was responsible for providing the hygienic care part of the "basic necessities of life." From Ms. Siemers' view, regardless of cause, any open injury exposed to the un-hygienic conditions described would be an entry point for fecal bacteria causing the fatal sepsis.

On appeal, Ms. Kern separately reasserts the above rejected ineffectiveness arguments. Additionally, she offers new arguments we need not discuss at this point because the underlying issues are rejected below. First, in Part B, we find no reversible error in the information amendment and arraignment process. Second, in Part C, we reject Ms. Kern's joinder and speedy trial arguments. Third, in Part E, we decide the trial court did not comment to the jury. We now turn to the remaining ineffectiveness argument, whether Ms. Siemers improperly failed to object to Dr. Gardner's alleged hearsay.

Ms. Kern contends Dr. Gardner's testimony should have been excluded because he related inadmissible hearsay. But Dr. Gardner was Ms. Lintner's treating physician, necessarily relying on the various reports and records for his diagnostic and treatment decisions. Further, Dr. Gardner specified Ms. Lintner's manner and cause of death on the death certificate. ER 703 allows an expert to opine on facts or data that are not otherwise admissible provided they are of a type reasonably relied on by experts in the particular field. *State v. Russell*, 125

Wn.2d 24, 73-74, 882 P.2d 747 (1994). And, as noted, tactical reasons exist for choosing not to object.

In sum, we apply a strong presumption of effective assistance, not Ms. Kern's suggested burden shifting to Ms. Siemers to show a plausible explanation for her alleged failures. Considering all, we cannot say Ms. Kern showed either deficient performance or prejudice.

B. Amendment and Arraignment Process

The issue is whether, under these facts, the trial court reversibly erred in allowing informal amendments and failing to formally re-arraign Ms. Kern.

CrR 2.1(d) provides: "The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." Thus, the prosecution is not free to amend the original charging document absent leave of court. *State v. Haner*, 95 Wn.2d 858, 863, 631 P.2d 381 (1981); *State v. Powell*, 34 Wn. App. 791, 793, 664 P.2d 1 (1983).

The record shows the court approved the second information. When asked how the State could add another charge going into trial, the court responded:

> Yes, Ma'am, they have got basically right up to the time of trial – in fact, in some circumstances during the middle of trial, as long as they have a basis, as long as it is not something completely out in left field that would surprise somebody, as long as it is reasonably related and it is just a matter of fine tuning the charges, that happens routinely. Probably happens in most cases to tell you the truth. So all I can say is there is nothing unusual about adding or deleting charges close to trial. It's just the way things work.

Report of Proceedings (RP) (Nov. 1, 2004) at 8-9. While formal entry is preferable, permission is shown.

CrR 2.1(d) allows an amendment "at any time before verdict or finding if substantial rights of the defendant are not prejudiced." Amendments are discretionary. *State v. Collins*, 45 Wn. App. 541, 551, 726 P.2d 491 (1986). A defendant must show prejudice in the amendment process. *State v. Laureano*, 101 Wn.2d 745, 761, 682 P.2d 889 (1984); *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Not seeking a continuance shows lack of surprise and prejudice. *Gosser*, 33 Wn. App. at 435. "Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." *Id.*

Here, counsel knew of the charges before trial, did not request a continuance to prepare a defense, and was able to conduct a defense to the additional charge. Ms. Kern waived her due process argument that she did not receive a written copy of the amended information by failing to request one. *State v. Royster*, 43 Wn. App. 613, 719 P.2d 149 (1986).

Ms. Kern was not re-arraigned on the amended charges, but the failure amounts to a due process violation only if it results in a failure to give her sufficient notice and adequate opportunity to defend. *Id.* at 619. Amendment may be permitted without re-arraignment if the substantial rights of the defendant are not prejudiced. *State v. Allyn*, 40 Wn. App. 27, 35, 696 P.2d 45 (1985) (citing *State v. Hurd*, 5 Wn.2d 308, 312, 105 P.2d 59 (1940)). Ms. Kern bears the

burden of showing prejudice. *Royster*, 43 Wn. App. at 619-20. As noted, Ms. Kern has not shown any prejudice. Given all, Ms. Kern effectively waived her right to a formal arraignment. *See State v. Anderson*, 12 Wn. App. 171, 173, 528 P.2d 1003 (1974).

C. Joinder and Speedy Trial

The issue is whether the trial court erred in permitting the second amended information by violating mandatory joinder or speedy trial principles.

Substantial rights include effective representation and a speedy trial. *State v. Earl*, 97 Wn. App. 408, 410, 984 P.2d 427 (1999). As noted in the amendment context, not seeking a continuance is persuasive of lack of surprise or prejudice. *State v. Brown*, 55 Wn. App. 738, 743, 780 P.2d 880 (1989). However, a speedy trial error requires dismissal, regardless of prejudice. *Earl*, 97 Wn. App. at 410.

Ms. Kern does not argue or show the second trial occurred outside the speedy trial period applicable to the initial charge. "[W]hen multiple crimes arise from the same criminal episode, the time within which trial must begin on all crimes is calculated from the time that the defendant is held to answer any charge with respect to that episode." *State v. Ross*, 98 Wn. App. 1, 5, 981 P.2d 888 (1999). Here, the additional charges were added and trial begun within the speedy trial period.

Under the mandatory joinder rule (CrR 4.3.1), two or more offenses must be joined if they are related and based on the same conduct. Offenses are based on the "same conduct" if they are based on "a single criminal incident or episode" or "the same physical act or omission or same series of physical acts," *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997), or if they

occur "in close proximity of time and place, where proof of one offense necessarily involves proof of the other." *State v. Kindsvogel*, 149 Wn.2d 477, 483, 69 P.3d 870 (2003). Here, the jury could have decided Ms. Kern was not responsible for the development of Ms. Lintner's injuries, but still hold her responsible for failing to report Robert's dereliction of his duties or vice versa. Thus, the two offenses are not the "same conduct" for purposes of mandatory joinder.

D. Evidence Sufficiency

The issue is whether sufficient evidence supports Ms. Kern's convictions.

We review evidence sufficiency challenges in a light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The challenge admits the truth of the State's evidence and all reasonable inferences. *Id.* We defer to the trier of fact and will affirm where the essential elements of the crime can be found beyond a reasonable doubt. *State v. Walton*, 64 Wn. App. 410, 415, 824 P.2d 533 (1992). Circumstantial evidence and direct evidence are equally capable of supporting a conviction. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Ms. Kern first argues the State failed to prove she recklessly withheld the "basic necessities of life" element of her first degree criminal mistreatment conviction.

RCW 9A.42.020(1) partly provides:

> A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, . . . causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

The "basic necessities of life" are defined as "food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication." RCW 9A.42.010(1). A person acts recklessly "when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c).

Here, Ms. Kern, and Robert contractually agreed to provide care duties for their greatly dependant mother. Partly specified are bladder and bowel control, skin, positioning, body care, and bathing standards. Ms. Kern provided afternoon care. Ms. Lintner was found on July 16 lying in urine and feces, foul smelling, dirty, with open sores, some infested with maggots six-days old, and other maggots crawling about. The jury could decide that anyone in a care role, including Ms. Kern who had been around Ms. Lintner during the critical time, who was even slightly observant would have observed the appalling conditions. A bacteria found in feces was found in her blood stream, not her urine. We will not interfere with the jury's fact-finding and credibility decisions. Sufficient evidence shows Ms. Kern failed to provide Ms. Lintner with contractually required basic hygiene, a basic necessity of life under the statute.

Moreover, Ms. Kern was trained to observe and react, with years of experience, not just with Ms. Lintner, but with other clients. The jury could reasonably find she "knew of" and yet "disregarded a substantial risk that a wrongful act" could occur from

not providing the specified health-related care and grossly deviated from a reasonable person's conduct. Given all, the jury could find that withholding health-related treatments caused Ms. Lintner great bodily harm. Thus, sufficient evidence exists for the jury to find Ms. Kern guilty of first degree criminal mistreatment.

Regarding evidence of failure to report, RCW 74.34.053(1) provides "[a] person who is required to make a report under this chapter and who knowingly fails to make the report is guilty of a gross misdemeanor." RCW 74.34.035(1) partly requires immediate mandatory reports to DSHS for neglect of a vulnerable adult.

A "[m]andated reporter" is defined in part as "an . . . individual provider." RCW 74.34.020(8). An "individual provider" is a "person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW." RCW 74.34.020(7).

> "Neglect" means "(a) a pattern of conduct or inaction by a person or entity of care that fails to provide the goods and services that maintain physical or mental heath of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety."

RCW 74.34.020(9).

Here, the jury could find Ms. Kern was a mandatory reporter because she was an individual provider. The jury could find Robert neglected Ms. Lintner by failing to

provide proper hygiene care to Ms. Lintner, by failing to prevent the bedsore by insisting that she be turned every two hours as required in the service plan, and by failing to tend to her wounds once they arose. Ms. Kern was in the home for four hours every day providing care. The jury could find she knew Ms. Lintner was being neglected and failed to report it. In sum, sufficient evidence supports both convictions.

E. Alleged Improper/Impermissible Judicial Comments

The issue is whether the trial court improperly commented on the evidence when it responded to a question posed by the jury during deliberations.

Article 4, section 16 of the Washington State Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This section prevents the jury "from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted," and it "forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). We presume improper judicial comments are prejudicial; the State must demonstrate otherwise. *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995).

An impermissible comment conveys to the jury a judge's personal attitudes toward the case merits or permits the jury to infer from what the judge said or did not say what the judge believed or disbelieved about the questioned topic. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). An instruction doing no more than accurately stating the

law does not constitute an impermissible comment. *State v. Ciskie*, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988) (citing *City of Seattle v. Smiley*, 41 Wn. App. 189, 192, 702 P.2d 1206 (1985)).

Here, the trial court merely restated the prior instructions and did not suggest to the jury the decision it ought to reach. The court underlined words in both instructions highlighting the differences between the two crimes after discussion with counsel and in Ms. Kern's presence, without objection. Nothing in the court's answer conveys the court's personal attitudes. No improper judicial comment is shown.

F. Constitutionality of RCW 9A.42.010

The issue is whether RCW 9A.42.010 is unconstitutionally vague on its face and as applied.

We review the constitutionality of a statute de novo. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 114, 937 P.2d 154, 943 P.2d 1358 (1997). We presume a statute is constitutional and the party raising a vagueness challenge must prove beyond a reasonable doubt the statute fails to make plain the general area of conduct it prohibits. *State v. Groom*, 133 Wn.2d 679, 691, 947 P.2d 240 (1997). When, like here, a challenged statute does not involve First Amendment rights, the statute is evaluated for vagueness, "as applied," in light of the particular facts of the case. *State v. Sullivan*, 143 Wn.2d 162,19 P.3d 1012 (2001).

A statute is vague if either it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or if it does not provide standards sufficiently specific to prevent

arbitrary enforcement. *City of Spokane v. Douglass*, 115 Wn.2d 171, 795 P.2d 693 (1990). Statutes are not void for vagueness merely because all their possible applications cannot be specifically anticipated. *Sullivan*, 143 Wn.2d at 184. We will not invalidate a statute simply because we believe the statute could have been drafted with greater precision. *Id.* "'[A] statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which [that person's] actions would be classified as prohibited conduct.'" *In re Contested Election of Schoessler*, 140 Wn.2d 368, 389, 998 P.2d 818 (2000) (second alteration in original) (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)).

Ms. Kern argues the statute is vague because ordinary caregivers would not know what was "medically necessary health care" or "hygiene" for one person versus another, and that she had a right to further definition so she could conform her conduct to the statute. But here, Ms. Kern was operating under a written contract identifying Ms. Lintner's specific health-related treatments and hygiene care needs. The terms are not undefined or unclear. The statute is not vague. Finally, considering Robert's plea negotiations, Ms. Kern's arbitrary enforcement argument also lacks merit.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Schultheis, A.C.J.

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Kulik, J.